

MELMS V. PABST BREWING CO.

The Doctrine of Waste in American Property Law

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Melms v. Pabst Brewing Co., an 1899 decision of the Wisconsin Supreme Court, may be the most important decision ever rendered by an American court concerning the law of waste. And while the doctrine of waste does not loom very large in public consciousness these days, it has held a peculiar fascination for property theorists, for it touches directly on an important line of division in how we think about property. Does property exist primarily to protect the subjective expectations that particular owners have in particular things? Or is the central function of property to maximize the value that society ascribes to particular things?

To put it somewhat dramatically, but I think not inaccurately: Is property an individual right or a social institution?

Melms involved a mansion on the south side of Milwaukee that was demolished in 1892 by Captain Frederick Pabst, the brewer of Pabst Brewing Company fame. Pabst owned the surrounding property, and thought that he owned the mansion, too. It turned out that Pabst did not own the mansion in fee simple. Rather, according to another decision of the Wisconsin Supreme Court—handed down four years after the mansion was destroyed—he held it only for the life of an elderly widow named Marie Melms. After Marie’s death, the Melms children would have inherited the mansion, if it still stood. The children sued Pabst, claiming that he had committed waste by destroying the home that was rightfully theirs.

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The Melms mansion (as seen in this undated 19th-century photograph) faced south on Virginia Street in Milwaukee, slightly more than a block west of modern-day 6th Street.
Courtesy of the Milwaukee County Historical Society. ▶





Melms mansion and beer garden, pre-1876, viewed from the southwest. *Courtesy of the Wisconsin Historical Society. WHI-53917.*

The Wisconsin Supreme Court's 1899 decision rejected the claim that Pabst had committed waste in leveling the mansion. The decision contained path-breaking language seeming to say that waste disputes should be resolved by comparing economic values. In other words, the court appeared to adopt the view that property is a social institution, not an individual right. My central objective here is to ask whether this is the correct understanding of the case, or of the lessons that it holds for property law more generally.

I.

Waste is one of the ancient writs of the common law, dating back to the twelfth century. It applies when two or more persons have interests in property, but at least one of them is not in possession. A lease is the most familiar example; a life estate followed by a remainder would be another. For convenience, I will generally refer to persons in possession as "tenants," and those out of possession as "absent owners," with the understanding that these terms cover a variety of situations with more technical terminology.

Waste is an action by an absent owner to prevent the tenant from injuring the absent owner's interest in property. The action for waste has always been preventive in nature. The Statute of Gloucester, enacted in 1278, provided that the absent owner could recover treble damages against the tenant for committing waste. This was obviously designed to deter tenants from harming the interests of absent owners. Many states today still have statutes providing for multiple damages for waste.

Waste comes in three varieties. Permissive waste is a form of nonfeasance. Suppose someone dies, leaving the tenant the house for life and then to the absent owner. While the tenant is in possession, the roof develops a leak, but the tenant does nothing to correct the situation, causing the interior to suffer water damage. Here, the tenant's nonfeasance has harmed the absent owner's interest in the house. The absent owner has an action against the tenant for waste.

Voluntary waste, the second variety, is a form of misfeasance. A simple example: the absent owner leases a farm with a cherry orchard to a tenant. The tenant cuts down the cherry trees and sells them for wood. Here the tenant's misfeasance has damaged the interest

of the absent owner. The absent owner has an action for waste against the tenant.

The third variety, called ameliorative waste, is the least common but by far the most interesting. Suppose that the absent owner leases a warehouse to the tenant for 20 years. Several years on, the tenant wants to remodel the warehouse into a trendy restaurant. This clearly represents a fundamental change in the property. But, the tenant argues, with supporting evidence from real estate appraisers, the property would be worth much more, in market-value terms, as a restaurant than as a warehouse. Should the absent owner be allowed to enjoin construction of the restaurant, or recover multiple damages against the tenant for waste if the tenant remodels? Or should we regard such market-value-enhancing changes as not being waste at all?

Melms is a stark example of this third variety of waste. Although the life tenant, Pabst, demolished the mansion, the Wisconsin Supreme Court held that he was not guilty of waste. The court described how circumstances in the neighborhood had changed since the mansion was built. The surrounding land had been graded down, leaving the mansion standing on an isolated knoll. What was once a residential neighborhood had become an industrial district. Because of these changes, the court said, the property was largely worthless as a residence. It was worth much more, in economic terms, with the mansion razed and the land graded down to the level of the surrounding property so that it could be used for industrial purposes.

Melms proved to be a milestone in a transformation in the law of waste that took place in the twentieth century. Before *Melms*, all courts would have regarded the deliberate destruction of a house to be waste. Indeed, any material alteration of property by someone temporarily in possession was regarded as waste.

After *Melms*, the old rule began to break down. Beginning in the 1930s, the traditional rule was replaced in many states by a multifactor standard. The standard is expressed somewhat differently in different jurisdictions, but it looks to factors such as changed circumstances, what a normal owner would do with the property, and whether the tenant's actions had increased or decreased the economic value of the property. In practice, economic value tends to dominate everything else. If the economic value goes up, this confirms what a normal owner would do and where the neighborhood is heading.

If the value goes down, the opposite inferences are drawn.

The conventional rule of waste—that the tenant can make no material change in the thing without the permanent owner's permission—is consistent with the view of property as an individual right. If I temporarily transfer possession of something to someone else, through a lease or a life estate, I am entitled to receive the same thing back.

The newer view of waste, reflected in the Wisconsin Supreme Court's decision in *Melms*, is consistent with the view of property as a social institution. Temporary transfers of possession create a potential conflict of interest between the tenant and the absent owner. Such conflicts should not be resolved by insisting that the views and aspirations of the absent owner always prevail. We should instead ask whose views are more congruent with the interests of society. The answer will depend on the circumstances of each case. What we need is a flexible standard that allows courts to take into account a variety of factors, including, perhaps most importantly, economic value, in order to resolve these disputes in the way that is best for society.

The same fundamental question—whether property is an individual right or social institution—arises throughout property law. Consider the law of nuisance. When property is threatened by pollution, are owners presumptively entitled to an injunction, allowing them to insist on shutting the polluting factory down? Or must they be content with an award of damages, leaving it up to the factory to decide whether to stop polluting or to pollute and pay—whichever creates the greatest wealth for society? Or consider the law of eminent domain. Should the government be allowed to condemn property in return for payment of just compensation only in situations of strict necessity? Or can the government use eminent domain for any project that promises to make the social pie larger, generating more jobs and tax revenue than the compensation that the government must pay to the owners whose property is taken? This of course is the debate raised by the United States Supreme Court's decision in *Kelo v. City of New London* in 2005.

Ameliorative waste, the issue in *Melms*, presents the same fundamental question, yet in a simple context, typically involving only two parties. We can regard it as a bellwether for assessing our understanding of the basic purposes of property law. ▶▶

II.

The roots of the Melms dispute lie in the untimely death of Charles T. Melms, generally known as “C. T.” In 1843 at the age of 24,

Melms immigrated to the United States from Prussia and settled in Milwaukee. He married into a brewing family, becoming a partner with his father-in-law, Franz Neukirch. Around 1854, Melms and Neukirch purchased land along Virginia Street, in the Menomonee Valley (so named after the local river) on the near south side of Milwaukee. There they developed a state-of-the-art brewery complex, called the Menomonee Brewery. By 1860, it was one of the largest breweries in Milwaukee. In 1864, Melms constructed a handsome Italianate mansion on the site. The house was placed high atop a terraced and landscaped garden overlooking Virginia Street. The terrace extended well to the west of the house, where Melms placed a beer garden with a fountain and gazebo.

In 1869, Melms sat on a needle, and (in that era before antibiotics) developed an infection and then lockjaw. As he lingered before dying, Melms executed a will leaving all his real and personal property to his wife, Marie, and urging her to carry on the family business. Marie and two of C. T.’s brothers were named executors.

C. T. Melms’s death at the age of 50 left his young widow, who spoke mostly German, with seven minor children to raise. Marie wanted to keep the business going but quickly concluded that it was impossible. The estate had debts far in excess of the value of its assets. On legal advice, Marie decided to exercise her right to renounce the will, and instead to take homestead and dower rights in the property. The homestead rights consisted of a life estate in the mansion and a quarter acre of land surrounding it. The dower rights consisted of a one-third life estate in all other real property that her husband had owned, including the brewery complex. These marital property rights were subject to existing mortgages, but not to claims of unsecured creditors. Because Marie renounced the will,

the balance of C. T.’s property passed by intestate succession to his children.

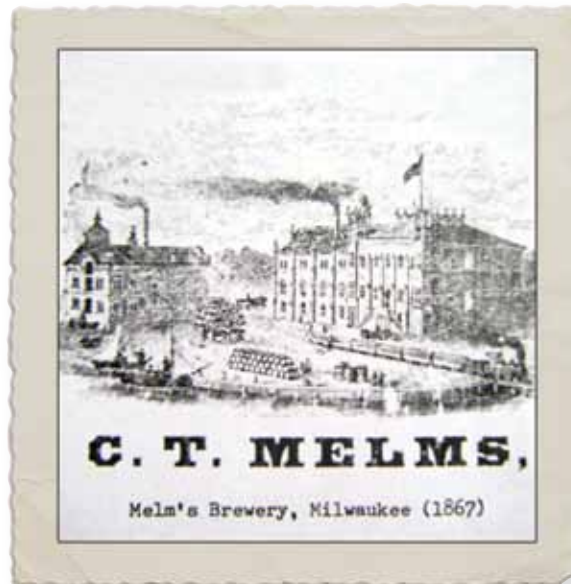
After Marie renounced the will and took homestead and dower rights, the executors petitioned the probate court for permission to sell the remaining assets of the estate. The court granted this request, and the assets were sold in multiple transactions. The property on which the mansion and the brewery stood, minus Marie’s homestead and dower rights and subject to existing mortgages, was sold to Jacob Frey, Marie’s brother-in-law, for \$379.50. The purpose of this transaction, almost certainly, was to strip away the claims of as many unsecured creditors as possible. If the unsecured creditors failed to object before the transaction was completed, there would be nothing but \$379.50 left in the estate to pay them.

Once the sale to Frey closed, Frey and Marie entered into a joint contract to sell all their interests in the Virginia Street property to Frederick Pabst and Emil Schandain, who were then doing business as the Phillip Best Brewing Company. Marie sold her homestead and dower rights, and Frey sold everything that he had purchased from the estate. The sale to Pabst was for \$95,000, minus assumption of mortgages, netting \$40,000 for Marie, which was paid to her over time

pursuant to a purchase money mortgage. Marie moved into humbler quarters, and used the money from the sale of the homestead and dower rights to support and educate her large brood of children. She eventually moved from Milwaukee and, ultimately, to Germany. Schandain and his family moved into the Melms mansion.

For the next almost 20 years, Pabst and Schandain operated the Melms brewery as the South Side Brewery of the Phillip Best Brewing Company, later to be known as the Pabst Brewing Company.

In 1886, Pabst and Schandain decided to consolidate their operations in an enlarged north side brewery, called the Empire Brewery. They closed the South Side Brewery and all its associated operations on Virginia Street. Schandain moved out of the mansion and died





The Melms brewery and mansion viewed from the northeast, pre-1870. *Courtesy of the Wisconsin Historical Society. WHI-53915.*

in 1888. In 1892, Pabst razed the mansion and graded the terraces on which it had stood, down to the level of the surrounding property. His apparent objective was to prepare the property for sale or lease as an industrial site, the judgment being that it would obtain a higher price if uniformly graded and without the mansion.

The site was eventually sold to the Pfister & Vogel Leather Company.

About the same time Pabst was tearing down the mansion, the Melms children learned from an uncle that the sale of property by the estate to Frey in 1870 was vulnerable because their mother—one of the executors—was a secret beneficiary of this transaction. They sued their mother (they previously had sued Pfister), as well as Pabst, claiming that the transaction from the estate to Frey was void, and hence Pabst had no valid title to the property. They also claimed that the only interest Pabst had acquired in the homestead was their mother’s life estate, and that the remainder after her death (she was still alive at the time in Europe) belonged to them.

The Wisconsin Supreme Court addressed these claims in separate opinions in 1896. The claim that the sale to Frey was void for fraud was assigned to Justice Silas Pinney.

He concluded that the sale was merely voidable, not void, and that Pabst was a bona fide purchaser for value without notice of any fraud, and hence had good title.

Justice John Winslow was assigned to deal with the homestead. The critical issue was whether the children’s remainders were included in the rights sold by the estate to Frey in 1870. If the remainders were sold to Frey,

then Frey had sold them to Pabst. If the remainders were not sold by the estate, they still belonged to the children.

The key document was the deed from the executors to Frey, executed on May 25, 1870, which was ambiguous on this point. It sold the entire parcel of land on Virginia

Street, together with “brewery, buildings & improvements thereon,” “excepting . . . that portion, which has been set apart as a homestead to the widow of the said deceased.”

This can be interpreted in two different ways.

By excepting “that portion” set aside for the homestead, did the deed except from the sale only Marie’s legal homestead rights, i.e., her life estate? Or did it except from sale both her life estate and the children’s remainders? If only the life estate was excepted, then the



ABOVE C. T. Melms. *Courtesy of the Milwaukee County Historical Society.* RIGHT Frederick Pabst. *Courtesy of the Wisconsin Historical Society. WHI-60078.*



remainders were included in the property sold to Frey. If both the life estate and the remainders were excepted, then the remainders were not sold to Frey and instead descended to the children.

Justice Winslow concluded for the court that Pabst had acquired only a life estate *pur autre vie* in the homestead property, which would expire upon the death of Marie. (She would die in late 1899.)

The conclusion that Pabst had acquired only a life estate was, in my view, almost certainly wrong. The deed to Frey (along with the License for Executors' Sale) was admittedly ambiguous. But the ambiguity should have been resolved in favor of Pabst, for three reasons. First, the deed that Marie and Frey executed when



Phillip Best Brewing Co.'s "South Side Brewery" along the Menomonee Canal, ca. 1880 (old Melms brewery in the background). Courtesy of the Wisconsin Historical Society. WHI-54326.

they sold their interests to Pabst was a warranty deed, promising that Marie and Frey jointly had sufficient interests to confer fee simple title on Pabst. Such a deed necessarily meant that Marie and Frey were selling both Marie's interest in the homestead and the remainder interests in the homestead. Second, Wisconsin law at the time provided that ambiguous grants of land should be construed as conveying "all the estate." All the estate here would mean both the life estate and the remainders. Finally, ambiguous deeds are construed against the drafter. Since Marie, as an executor of her husband's estate, had signed the deed to Frey, any ambiguity in that deed should have been construed in favor of the grantee, Frey, meaning that he received the remainders. For multiple reasons, then, the instruments should have been construed to mean that the estate sold the children's remainders to Frey, who in turn sold them to Pabst.

Did the estate have the authority to sell the children's remainders? Almost certainly it did. These were vested remainders, not contingent remainders, and vested remainders have always been regarded as being alienable inter vivos. When Marie rejected the will, electing to take a life estate in the homestead, the remainders in the homestead were inherited by the children, who were minors. The Wisconsin Supreme Court, in a case decided in 1884 (involving the children's suit against Pfister), had specifically held that Marie, as an executor of the estate and legal guardian of the children, was competent to act on their behalf.

The Wisconsin Supreme Court's erroneous ruling that Pabst had only a life estate in the homestead nevertheless gave the Melms children their third and final shot at securing some satisfaction from the Pabst Company. If Pabst had only a life estate, then Pabst had a legal duty not to commit waste to the injury of the remaindermen, i.e., the Melms children. Accordingly, the children sued Pabst yet again, this time for committing voluntary waste by demolishing the mansion on the homestead property in 1892. Under Wisconsin law at the time, a party who committed waste was liable for double damages.

It is not unlikely that the Wisconsin Supreme Court, when it heard the third *Melms* lawsuit in 1899, realized that it had made an error in holding that the Melms children had remainders in the homestead property. At the very least, it must have realized that it would be highly inequitable to penalize Pabst for acting as though he owned the mansion outright when he had every reason to believe, based on the representations of the parties from whom he had purchased the property, that he owned the mansion outright. The right thing to have done—the candid, forthright, courageous thing to have done—would have been to overturn the decision about title to the homestead, or at least to absolve Pabst from liability based on a good-faith error. But, perhaps to avoid an embarrassing reversal, the Wisconsin Supreme Court did not do the right thing. Instead, it fudged the facts, and, in so doing, transformed the law of waste.

III.

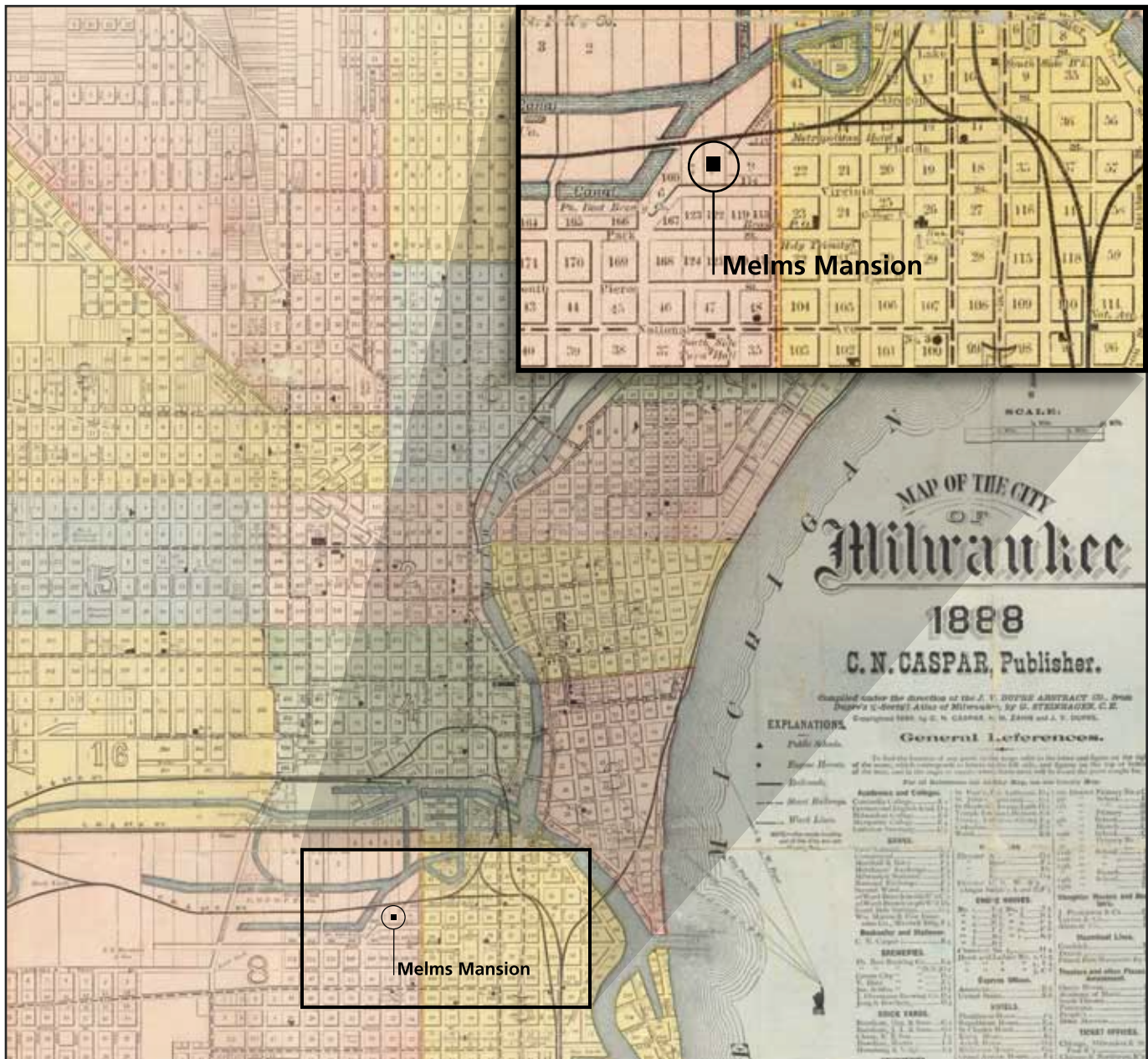
When the Melms children's waste action went to trial, the opposing sides presented very different views of the waste issue.

The children's theory was that they were entitled to inherit a specific thing—the mansion built by their father. In order to make them whole, Pabst was required to

pay an amount that would permit the mansion to be reconstructed. Their evidence thus went to the cost of reconstruction.

Pabst presented a very different view of the matter. In his view, the critical question was the market value of the mansion. The children were entitled to the land, but they should not be awarded damages for waste if the presence of the mansion added nothing to the value of the land. Pabst's witnesses therefore testified that the mansion, if it still stood, would have little or no rental value and would not be attractive to purchasers at

any price. Some witnesses said that the elevation of the structure high above the street meant that there were too many steps to climb. Others testified that the dominant use of property on the north side of Virginia Street had changed from residential to manufacturing, and that the highest and best use of the land would be as a factory site. The picture they painted was of a forlorn house perched on a high knoll, surrounded by industrial property. The circuit court ruled that Pabst had not committed waste. ▶▶



Courtesy of the American Geographical Society Library, University of Wisconsin–Milwaukee Libraries.

The Wisconsin Supreme Court unanimously affirmed. Justice Winslow wrote that there was nothing wrong with traditional definitions of waste. Nevertheless, it was important to recognize that application of these concepts was necessarily subject to “reasonable modifications as may be demanded by the growth of civilization and varying conditions.”

Thus, although the Wisconsin court had previously held that it was waste for a tenant to cut a hole in the roof of a boarding house to install a chimney, the present case involved “radically different” elements. What was so radically different about Pabst’s destruction of the Melms mansion? Simply put, the neighborhood had changed. The Wisconsin Supreme Court painted a picture of inexorable socioeconomic change sweeping the south side of Milwaukee:

“The evidence shows that the property became valueless for the purpose of residence property as the result of the growth and development of a great city. Business and manufacturing interests advanced and surrounded the once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by factories and railway tracks, absolutely undesirable as a residence and incapable of any use as business property. Here was a complete change of conditions, not produced by the tenant, but resulting from causes which none could control.”

Under the circumstances, the court indicated, no reasonable person in Pabst’s position could ignore the new conditions in the neighborhood.

The Wisconsin Supreme Court said that when “there has occurred a complete and permanent change of surrounding conditions, which has deprived the property of its value and usefulness as previously used,” the question whether the tenant “has been guilty of waste in making changes necessary to make the property useful” was a question of fact, to be decided by the trier of fact.

It would be an overstatement to say that *Melms* unequivocally repudiated the understanding of property as the right to specific things, and substituted in its place an understanding of property as a storehouse of wealth measured by market prices. After all, the court insisted that, ordinarily, a tenant is obliged to return the thing in a substantially unchanged condition when the tenancy ends. But by creating an exception for changed circumstances, the court moved a long way toward embracing the understanding of property as economic value.



This map, primarily taken from *Rascher's Fire Insurance Atlas of the City of Milwaukee* (1876 as updated 1885) and combined with the 1888 *Rascher's*, depicts the Melms mansion and vicinity as they would have appeared at the time of the 1892 teardown. Note the neighborhood of houses on the other side of Virginia St. and continuing south toward Park St. (today Bruce St.) and farther south (beyond the margin of this excerpted image). *Courtesy of the Milwaukee Public Library.*

IV.

The decision of the Wisconsin Supreme Court in *Melms* rests on one of the oldest tricks in the appellate court playbook: changing the facts to fit the desired result. The Melms mansion was affected by changed circumstances before it was demolished, but the changes were not the product of urban growth or socioeconomic changes to the neighborhood. The changes were due to the actions taken by Pabst himself.

When Pabst and Schandain purchased the property, the mansion and the beer garden were an integral part of a valuable and fully functioning brewery operation. The mansion would be occupied by the brewmaster and his family, who would oversee the operations of the brewery, the malt house, the bottling plant, and the other associated facilities. The beer garden on the terrace, in common with other breweries operated by German families in Milwaukee in the nineteenth century, served as an important marketing tool in selling beer. The house and beer garden stood on an elevation facing a dense residential neighborhood and beckoned to thirsty customers on warm evenings.

The first action taken by Pabst that undermined the economic value of the mansion was the decision to open a new bottling plant in 1881, just to the west of the mansion. This required cutting down a large portion of the terrace that served as a beer garden. Several years later, Pabst closed the South Side Brewery and consolidated his operations in the Empire Brewery on the north side. Considering only access to transportation, this was a questionable decision. The South Side Brewery had an enviable location, abutting both water and a rail line. The Empire Brewery, which was landlocked, had neither



Former site of Melms Mansion

This modern aerial view (© Google) shows the site today. Note the houses on Bruce St. (formerly Park St.) and continuing to the south.

advantage, and thus incurred the additional expense of having its barrels hauled to a train station or docking facility. It is possible that changing demographics had something to do with the decision. The south side was rapidly being populated with Polish immigrants, and Pabst may have regarded the north side, which was more heavily German, as a more congenial location. The critical point is that the decision by Pabst to close the South Side Brewery was not forced on him by economic necessity but was a voluntary decision of uncertain motivation.

Closing the South Side Brewery set in motion a series of actions that led to the destruction of the mansion. Once the brewing operations were eliminated, it no longer made sense to keep a beer garden and brewmaster's house on the property. Sure enough, without a brewery to supervise, Schandein moved away, leaving the house vacant. The remaining terrace on which the beer garden stood was soon cut away, leaving "an isolated lot and building, standing from twenty to thirty feet above the level of the street." Critically, it was this point in time—when the house stood empty on an isolated knoll—that the Pabst witnesses used as their point of reference in commenting on the market value of the mansion. But the fact that the mansion had much-diminished market value because of its physical isolation and lack of a tenant was entirely due to decisions made by Captain Pabst.

What then about the neighborhood? The Wisconsin Supreme Court suggested that the neighborhood had been transformed from residential to industrial, and hence was no longer a fit place for a family to live. But a careful review of the testimony offered by the Pabst witnesses reveals that no one claimed the neighborhood in general was no longer residential. Maps from the era show that the south side of Virginia Street, directly opposite the mansion, remained fully residential, as did much of the area further to the south and east of the property. To the south of Virginia Street, the area was, and indeed

today still is (one short block farther south), completely residential.

There is a broader lesson in this mischaracterization of the facts. If demolishing the mansion was ameliorative waste, then the tenant himself created the condition that he was ameliorating. This suggests a serious complication in using economic value as a measuring stick for determining waste. What is the temporal baseline against which one measures changes in economic value? In the *Melms*

case, if the baseline is 1870, when the South Side Brewery was a fully functioning operation, tearing down the mansion would have reduced the market value of the property. If the baseline is 1890, after Captain Pabst had closed the brewery and excavated around the mansion, then tearing down the mansion presumably enhanced the market value of the property. By picking 1890 (or so) rather than 1870 as the baseline, the Wisconsin courts made it much easier to let Captain Pabst off the hook.

V.

The real transformation in the American law of waste occurred not in the nineteenth century, as Morton Horowitz and other scholars have suggested, but in the twentieth. That transformation was not a manifestation of inexorable social and economic change. Rather, it was a top-down reform influenced by the Legal Realist movement. Two decisions framed the argument for reforming the law of waste. One was *Melms*. The other was a New York decision, *Brokaw v. Fairchild*. The two decisions involved striking similarities in their facts, but very different outcomes.

At the center of both cases were large stately mansions constructed in the latter half of the nineteenth century. In both, life tenants wanted to tear down the mansion and replace it with a more economically valuable use: industrial property in the case of the Melms mansion, a high-rise apartment in the case of the Brokaw mansion. In both, persons with interests in remainders following the life estates objected to the destruction. In *Brokaw*, nieces and nephews who had a small chance of inheriting the property sought an injunction to prevent the life tenant from tearing down the mansion.

The orthodox view of the two cases, as it emerged in the 1930s, is roughly as follows. *Melms* was correctly

decided. The *Melms* court recognized that a rigid and unbending view of ameliorative waste is undesirable. Courts should not always insist on preservation of the property, but should take into account a variety of factors, such as changed circumstances of the neighborhood and relative economic values, before deciding whether ameliorative waste should be condemned.

Brokaw (the orthodox view continues) was wrongly decided. Isaac Brokaw, a wealthy New Yorker, built a complex of mansions on Fifth Avenue between 79th and 80th Streets. He left each of his children a mansion, to be held by them for life, and then inherited by their children; only if his children left no children was the property to be inherited by his other children's children, that is, the nieces and nephews. After Isaac's death in 1913, the preferred use of land on Fifth Avenue changed, with mansions coming down and apartment buildings going up. Isaac's son George, who had the mansion at the corner of 79th Street and Fifth Avenue, found living in the old mansion oppressive. It was large and drafty, and expensive to maintain. George tried to rent it out, but found no takers. He proposed demolishing the mansion and building a 13-story apartment building. When some of the nieces and nephews objected, the New York courts agreed that demolition of the mansion would be waste.

The *Brokaw* decision was widely condemned by leading law professors of the day, especially those influenced by the Realist movement. It was decried as rigid and unreasonable, an impediment to progress. A blue-ribbon panel of law reformers, the New York Law Revision Commission, recommended that the decision be overturned by the New York legislature. The commission's idea of a sound approach to the law was the Wisconsin Supreme Court's decision in *Melms*. The commission proposed a

five-part test for determining whether an action is waste, including whether the area has experienced changed circumstances and whether the modification would enhance the value of the property. The New York legislature adopted the proposed law in 1937, and it remains in effect today.

The New York reform proved to be highly influential with bodies like the American Law Institute, which also adopted a test consistent with *Melms* for inclusion in the *Restatement of Property*. Eventually, a majority of states adopted the *Melms* approach, looking to multiple factors

including changed circumstances and economic value in deciding whether voluntary transformation of the property should be regarded as waste. Only a minority—about ten states—continue today to adhere to the *Brokaw* approach, which condemns as waste any material alteration of the property.

At bottom, *Melms* and *Brokaw* embody conflicting views of the basic purpose of the law of property.

Brokaw views property as an individual right.

Isaac Brokaw had a right to specify that his grandchildren would inherit the mansions

he built. This is different from the right to say that they would inherit either the mansions or something else having equal or greater monetary value, like an apartment house. *Melms* is understood to embody the view of property as a social institution. The ultimate question is, what was the highest and best use of land? Is the site better suited for a mansion or a factory? If the correct answer is a site for a factory, then the law should facilitate the efforts of individuals to reach the correct answer, without regard to what particular individuals with possibly idiosyncratic views might think. *Melms* is the catalytic decision that began the process of remaking the doctrine in this fashion.



The Isaac Brokaw Mansion, 5th Avenue and 79th Street, New York City. Undated. The mansion was razed in 1965 in favor of a 25-story apartment building. Courtesy of the Museum of the City of New York. The Underhill Collection. B.1642.

VI.

The ultimate question, of course, is whether this was a change for the better. To help answer that question, we need to consider how the doctrine of waste actually functions in the modern world.

It turns out that it functions silently, and mostly in the background. The reason for this is that the issues governed by the law of waste are today largely handled by contract. The law of waste has always been understood to be subject to modification by contract. At common law, if a conveyance was made “without impeachment for waste,” this meant that the tenant was free to make modifications to the property that otherwise might be chargeable as waste. Over time, contractual provisions concerning the treatment of property by tenants have become ubiquitous, to the point where the action for waste is rarely invoked.

The reason for this is probably that the costs of contracting have steadily fallen, first through the widespread use of standard-form contracts, more recently through the use of easily copied digital files. As contracting has become cheaper, contractual solutions have increasingly squeezed out the solution imposed by the law of waste.

Take landlord-tenant relations. The law of waste provides an important background principle for landlord-tenant relations. But today, nearly every leasehold longer than a month-to-month tenancy is governed by a written lease. And nearly every written lease will spell out, in some fashion, the respective duties of the landlord and tenant in terms of maintaining the property, as well as the tenant’s obligation to obtain the landlord’s permission before undertaking any significant modification of the property.

Similarly, take family wealth settlements. Again, if someone wants to divide family property over two or more generations, the law of waste provides an important background principle in describing the respective duties of the present and future generations. But today, if specific assets are conveyed to one person for life and then to one or more remaindermen after that person dies, this is nearly always done by creating a trust. The trust instrument will spell out what powers the trustee has to sell, mortgage, or modify specific assets held in trust. When a dispute arises over whether to turn the family mansion into a bed-and-breakfast, it will be resolved by the trustee, subject to review for compliance with the trust instrument and general trustee duties, not under the law of waste.

Importantly, nearly every dispute over the tenant’s treatment of property presents not one but two potential opportunities to resolve the issue by contract. The issue can be resolved *ex ante*, by drafting appropriate provisions in the lease or the trust. But if the issue is overlooked, or the parties are not happy with the resolution that has been adopted *ex ante*, then there will be another opportunity to negotiate a contractual solution *ex post*. *Ex post*, the transaction costs of contracting will be higher, given that the parties are locked into a relationship with each other—a bilateral monopoly—and this can lead to extensive strategic maneuvering or even to bargaining breakdown. Nevertheless, contractual modifications of duties toward specific property can be and often are modified *ex post*. Landlords and tenants do renegotiate leases, and beneficiaries do persuade trustees to modify their management of property under trust.

Because the law of waste has been largely superseded by contract, the question about what form the law of waste should take can be seen as a question about the best default rule—that is, the best gap filler to apply when the contract is silent. If we view the doctrine as a type of contract default rule, what is the best version of the law of waste?

Given that nearly all disputes between tenants and absent owners are today resolved by contract, a simple, intuitive rule that is easy to apply without expert input may be the best default. The reason is simple: such a rule will reduce the cost of contracting. Let us assume that the parties to a potential waste dispute both understand the outcome that would maximize their joint welfare. Taking the *Melms* dispute as an example, let us say that the optimal outcome is to tear down the mansion and level the ground as an industrial site. In order to agree contractually on this outcome, however, the parties must agree on which party must make concessions to the other and in what amount. Must the life tenant (Pabst) make a side payment to the remaindermen (the *Melms* children) in order to obtain their permission to make the change? Or can the life tenant proceed without the permission of the remaindermen, and perhaps even demand a contribution from them as a condition of making the change (by eliminating the cost to them of future demolition)? If the default rule is uncertain or requires extensive investigation, then it will be more difficult for the parties to reach an agreement on these issues. A simple, intuitive, self-applying rule, in contrast, is likely to make the baseline of entitlement clear to both parties, and hence will facilitate the process of reaching a contractual solution that prescribes the optimal outcome. ▶▶

The commentary on the law of waste, in contrast, tends to assume that the rule should be designed not to reduce the costs of contracting, but to allow courts to reach the right outcome in litigated disputes. This would be the correct perspective if most or even a significant number of such disputes were resolved through litigation. But I have suggested that this is not in fact the case. The law of waste functions as a default rule or baseline for contracting, not as a decisional rule applied by courts—at least not very often.

Given their court-centered perspective, the commentators argue in effect that courts should adopt, as a default rule, the rule that the parties would have adopted for themselves if they had thought about the problem. This will presumably leave them better off than any other rule, and the objective of contracting is to enhance the joint welfare of the contracting parties.

One prominent suggestion along these lines, urged by John Henry Merryman, a Stanford law professor who wrote the chapter on waste for the *American Law of Property*, would ask the following in each individual case: what would *these particular parties* have agreed upon had they thought about the matter, based on their individual wants and desires? In effect, the question in every case should be one of intention: did the tenant's actions contravene or frustrate the intentions of the grantor? All the circumstances of the parties should be considered in answering this question. If no signposts of intention can be uncovered, then the grantor should be presumed to have intended that the tenant would engage in reasonable conduct, in light of all the facts.

Another approach, which also adopts a court-centered perspective, asks instead, what would *persons in general* have agreed upon in these circumstances? This is the approach urged by Judge Richard Posner in his *Economic Analysis of Law*. Judge Posner observes that the tenant and the owner have different time horizons. The tenant will generally want to maximize the return to the property during the time the tenant is in possession; the absent owner will want to maximize the return during the time after the tenancy ends. Posner argues that the best approach is to maximize the value of the property over both periods. This yields the largest net value, which the parties can divide among themselves as they wish. This is also the approach, Posner says, that an economically rational owner who holds an undivided interest in the property would adopt. The appropriate default rule for judging the actions of the tenant is thus whether the tenant has acted in the way an economically rational owner



Melms mansion viewed from the northeast. Undated.
Courtesy of the Milwaukee County Historical Society.

of an undivided interest in the property would have acted. Here we see the idea that the proper measure of property is social value, measured by market prices, adopted explicitly.

Neither approach, it seems to me, is likely to be optimal if it turns out that nearly all disputes between tenants and absent owners are resolved by contract. The most basic difficulty is that both approaches are relatively expensive, because they make waste turn on something that is invisible. The grantor's intention is not readily visible to the naked eye, nor is the market value of the property. I am not saying that these things are not real. But they cannot be observed by ordinary people. They require investigation and expertise.

This means, in turn, that using either grantor intent or economic value as a criterion for identifying waste will be relatively expensive. Merryman's intent test will often require a complicated inquiry into legal documents and personal circumstances that cannot be discerned by looking at the land. An investigation into the circumstances of the parties may be required, as well as consultation with legal experts about the proper interpretation of the terms in leases, wills, and trusts. Posner's economic-value approach is also expensive. Experts will have to testify about different uses of property and different market values for different uses.

Legal standards that require extensive fact-finding and expert advice are not always bad things. But in this context, they are misplaced. Given that disputes about tenant conduct are today overwhelmingly resolved by contract, the default rule should be one that makes it easiest to contract. Specifically, the rule should be one that ordinary individuals can discern and apply without having to resort to legal investigation or a real-estate appraiser. Such a rule will make it much easier for the parties to understand whether they want to deviate from the default rule, and what the contract must say if they want a different result.

Another problem associated with both the Merryman and Posner solutions is that there will likely be considerable uncertainty about their proper application. Under Merryman's approach, it is not always clear whose intention counts. In a landlord-tenant relationship, is it just the landlord's intention, or is it also the tenant's? Among other examples, in the life-estate context, do only intentions of the grantor count? What if a life estate is created by legal election, as in the case of the Melms estate? The root of the problem is that temporal divisions of property are not simple variations on conventional bilateral contracts. Property rights can be transferred and divided in a variety of ways, and it is far from clear that there is some unique set of intentions that attach to every decision to divide title over time.

Posner's economic-value test suffers from a different uncertainty in application, related to picking the appropriate baseline for comparing two different states of the world. Posner's discussion presupposes that each parcel of property will have a unique value-maximizing use, and that the rational owner will always adopt this use. But there will often be uncertainties about the proper unit of time or the proper physical unit for applying the economic-value test. For example, persons often acquire property intending to hold it for future expansion or development. This may entail holding it in a suboptimal use for a significant time until the development can take place. Likewise, persons may hold multiple parcels of property, which fit together in a general scheme or plan, even though individual parcels are deployed in ways that are suboptimal from a market perspective. These uncertainties generate even greater need for expert input and undoubtedly magnify the expense associated with the use of the test.

If disagreements about modifications of property by tenants were nearly always resolved by litigation, then I would agree that either Merryman's intent test or Posner's economic-value rule might be warranted. Such rules would be more uncertain and expensive to administer. But they would allow courts to reach judgments that would produce more satisfactory outcomes, from either an individual or a social-welfare perspective.

The extreme infrequency of modern cases applying the doctrine of waste, however, strongly suggests that contractual solutions are the norm, not litigation. Given the ubiquity of contractual solutions to the problem, the default rule should be designed to induce the parties to address the issue by contract. Jed Purdy, in writing about this issue, has used the phrase "bargain-inducing default rule," which seems to me to capture the idea nicely.

VII.

If the intention test and the economic-value test are too expensive because they require expert input and are uncertain in application, then does the traditional common-law rule—prohibiting material alterations in the premises—function better as a default rule in a context where contractual solutions are the norm? The answer, I think, is "Yes."

The critical facts under the traditional rule are the condition and use of the property when title is first divided, and the condition and use of the property when the tenant's custodial practices are challenged. These facts are visible to the naked eye. To determine these facts, one does not have to consult lawyers schooled in the interpretation of legal documents, or real-estate appraisers adept at assessing the market value of property. One need only examine the property itself or—in the event the property has been modified—consult architectural drawings, photographs, or evidence about its condition when title was divided. We do not need to take elaborate evidence about what the parties intended when they divided the property; what most owners would have done with the property under the circumstances; what the economic value of the property was before and after the tenant modified it; whether the neighborhood has changed and, if so, whether the source of the change was independent of the tenant's actions; and so on and so forth.

Given these features, the traditional common-law rule should function well as a bargain-inducing default rule. It is simple, intuitive, and self-applying. It sends a clear signal to the parties about their respective rights and obligations. If the parties want a different rule, they will know that they must contract for a different rule. The traditional rule will thus facilitate contractual solutions, and it will do so both *ex ante* and *ex post*.

The traditional rule also avoids knotty questions about application that arise under either the Merryman intent rule or the Posner economic-value approach. The condition and use of the property when the property is first divided set the baseline against which future tenant behavior is measured. If the tenant materially changes the condition, the tenant has committed waste; otherwise not. The condition when the dispute erupts is also a physical fact that exists with respect to every parcel whose title is divided. There are thus no conundrums about application, analogous to whose intent we consult under the Merryman test or what unit we use for valuation under the Posner approach. ▶▶

Admittedly, the qualifier “material” in the common-law rule injects a bit of wiggle room. What it means, I think, is that the rule is to be applied with a view to normal owner behavior (cf. Robert Ellickson’s employment of normal use, as measured by “contemporary community standards,” as a baseline in nuisance law). In other words, given the condition of the property at the time the title is divided, what actions would a normal owner take in maintaining the property in this condition? We do not ask whether a normal owner would *change* the condition of the property. We just ask what a normal owner would do in order to preserve the condition *unchanged*.

Let me offer an illustration. Some of the early common-law judges and commentators got tied up in knots trying to specify when a tenant is allowed to cut down trees. They said that cutting down trees to profit from the timber was waste, whereas cutting down trees for necessary repairs to the estate or for fuel was not waste; and so forth. A better understanding would be that courts should look to what constitutes normal behavior. If an agricultural tenant would normally cut some trees to repair fences and for firewood, then this would not be a material alteration. If an agricultural tenant would not normally cut trees for commercial sale, then it would be a material alteration. Most of the early cases about trees are consistent with this general understanding, whatever verbal formulations they may have adopted.

VIII.

There is still more to be said in support of the traditional common-law rule. In prohibiting the tenant from making any material alteration in the property, it broadly comports with the understanding that the purpose of the institution of property is to protect the subjective expectations that particular owners have in particular things. When possession is temporarily transferred, the owner is entitled to expect that what comes back is the same thing the owner had when possession was transferred. Not something else of equivalent value. The thing itself. The traditional rule is the kind of rule that we would expect a legal system to adopt that conceives of property as an individual right, not simply a social arrangement for maximizing wealth.

Wait a moment, you may object: if title is divided, then there are at least two people who have some stake in the thing—the absent owner and the tenant. The

common-law rule protects the autonomy of the absent owner about her thing, but it does so by disregarding the interests of the tenant regarding the thing. Why adopt a rule that protects one party at the expense of the other? Why not balance their interests, or adopt some kind of approach that tries to reach an accommodation by giving weight to both interests?

Part of the answer is that we are dealing here with probabilities. The law of waste makes the judgment that the absent owner is more likely to have a strong subjective attachment to property than is the tenant temporarily in possession. This is just a generalization. But the exceptional cases—for example, a tenant with a 99-year lease—are precisely those in which we would most expect to find a contract giving the tenant discretion to modify the use of the property. The common law, by giving the right to control to the absent owner, reaches the right result in the largest number of cases, and allows the smaller number of cases where this does not work to be handled by contract.

Another and more fundamental part of the answer is that we cannot balance interests between tenant and absent owner without abandoning the idea of property as an individual right. If property is a right of particular persons to protect their subjective expectations about things, then property must confer sovereign-like powers on those we regard as owners. This includes the power to give possession of your property to others and expect to get it back.

Waste is one area where we do not have to choose between the traditional understanding of property as an individual right and the rival conception of property as an institution for maximizing social value. We can retain the understanding of property as an individual right, and rely on the institution of contract to protect the societal interest in deploying resources to the greatest social advantage. There would seem to be little reason to abandon the idea of property as a source of protection for individual autonomy absent a strong justification for doing so. No such justification exists here.

The Wisconsin Supreme Court in *Melms* started us down the path toward a law of waste characterized by utilitarian balancing and economic valuations of competing uses of land. There was no need to do so. Captain Pabst should have been absolved of liability based on his good-faith mistake about title to the mansion. The law of waste should have been left unchanged. Had it remained unchanged, it is possible that it would remain unchanged today. ■